No. 600

IN THE

Supreme Court of the United States

October Term, 1936

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE W. NORRIS,
Respondent.

ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF RESPONDENT

This brief supplements the brief heretofore filed by respondent in opposition to petition for writ of certiorari, and answers the brief of petitioner filed herein after the writ of certiorari was granted.

QUESTIONS PRESENTED

Petitioner states four certain questions as being those presented in this case, three of which, the first, second and fourth, are incorrectly stated. We will make the cor-

rections as to these questions under the separate headings, following in this brief, the same order as in the recent brief of petitioner.

ARGUMENT

I.

Congress Has No Power to Legislate for the Purpose of Regulating Primary Elections

Petitioner states the first question as being, "Whether the Senate Committee was competent to institute, and to exact evidence in, the inquiry in which respondent testified." This is by far too broad a statement of the issue. The Senate Resolution in question authorized the investigation of campaign contributions of candidates both before "senatorial primaries" and "in the general election in November, 1930."

The questions which were put to respondent by the Senate Committee in question, and which are the basis for the indictment herein, at most could pertain only to the 1930 (August 12) primary election in Nebraska and in no respect to any candidacy or any campaign of any candidate for United States Senator.

While it may be conceded that in case of an actual contest of the election of a United States Senator, a Senate Committee has power to inquire concerning campaign expenditures of candidates for the Senate at the general election, the question here at issue is whether or not the Committee had the power to investigate matters pertaining solely to the state primary election which was held on August 12, 1930, a month and ten days prior to

the day when respondent first testified and which inquiry also in no wise pertained to the candidacy or any campaign of any person for the United States Senate.

The evidence which was elicited by these questions propounded to respondent in no sense pertained to the general election. These questions developed proof only to the effect that respondent paid to the County Treasurer of Custer County, Nebraska, the filing fee as a candidate for State Railway Commissioner, sent the treasurer's receipt and his application requesting that his name be placed upon the ballot as a candidate for that office at the primary election, to a friend in Lincoln to be later filed. Thereafter he was approached, as related in our original brief, by A. Paul Johnson, who sought to persuade the defendant "not to file as a candidate for Railway Commissioner but instead to file" as a candidate for the Republican nomination for United States Senator at the primary election to be held in August, 1930 (R. 27, 34).

Petitioner asserts that "potential judicial action justified the Senate in passing Resolution No. 215" and the exacting of evidence of respondent by the Committee appointed under said resolution because under article 1, section 5, clause 1 of the Constitution it is provided that "Each House shall be the Judge of the Elections * * * of its own Members," and cites the cases of *Reed v. County Commissioners,* 277 U. S. 376, 388; *Barry v. United States ex rel. Cunningham,* 279 U. S. 597, 613.

It will be noted, however, that these two cases pertaining to the contest of the election of one Vare to the United States Senate. As stated in the Barry case, Vare had received a certificate of election to the Senate and "presented himself to the Senate, claiming all the rights

of membership." "Thereby," said this Court, "the jurisdiction of the Senate was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of article 1 of the Constitution."

In the Reed case the opinion states that "Vare was given the certificate of election, and Wilson initiated a contest." Thereafter the Senate Resolution in question was passed, reciting the charges that were made in the contest of Vare's election and efforts were made to take and preserve the ballot boxes, ballots, return sheets, records, etc. Thus there was an actual contest of a seat in the Senate at issue, but in the case at bar there was no contest or issue, even remotely possible, that would involve any seat in the Senate. There was no question before the Senate involving any controversy. The inquiries propounded to respondent did not pertain to the acts or doings of any candidate for the United States Senate.

This Court said, in *Sinclair v. United States*, 279 U. S. 263, 49 S. Ct. 268:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

But petitioner asserts in its brief (Op. Br. 26):

> "Before the Committee actually made inquiry of the respondent is was *reasonable to suppose* that this campaign had been financed not by the Republican party or by some defeated Republican aspirant like

> Stebbins, but had been financed by the Democratic party or even by the successful candidate in the Democratic primary. The Democratic candidate *might* justifiably have concluded that he could win only if his Republican opponent was someone other than Senator Norris; and that the only way to prevent the Senator's re-nomination was to finance the respondent. That this argument is not attenuated, but is based on a *possibility* in the mind of the Senate Investigating Committee, is shown by the record."

But a criminal prosecution cannot be based upon suppositions, possibilities, or conclusions that might be drawn, for "no one can be punished for crime against the United States unless facts shown plainly and unmistakenly constitute an offense within the meaning of an Act of Congress." *Speeter v. United States* (C. C. A. 8), 42 F. (2d) 937 (above quotation from opinion in this case); *Donnelly v. United States*, 276 U. S. 505, 48 S. Ct. 400; *United States v. Lacher*, 134 U. S. 624, 10 S. Ct. 625; *Fasulo v. United States*, 272 U. S. 620, 47 S. Ct. 200.

This Court said in *Newberry v. United States*, 256 U. S. 232, 41 S. Ct. 465:

> "We cannot conclude the authority to control *party primaries* or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise *would interfere with purely domestic affairs of the state* and infringe upon liberties reserved to the people."

(All italics in this brief are by the author.)

In *Seymour v. United States,* 77 F. (2d) 577, 579 (C. C. A. 8), the Court said:

> "and it is true that the inquiry here was concerned wholly with a primary election; that is, it may be conceded that Congress had no power to legislate for the purpose of regulating primary elections, such as involved in this inquiry."

This subject is discussed at pages 17 to 20 of our original brief. It is closely akin to that of Materiality, discussed in this brief under number III.

II.

To Constitute Perjury It Is Essential That the Oath Be Taken in a "Case in Which a Law of the United States Authorizes an Oath to Be Administered." The Charge of Crime Must Have Clear Legislative Basis

Petitioner states the second question presented as being, "Whether there was a *law* of the United States authorizing an oath to be administered in that inquiry." That, however, is not the issue raised by respondent. Rather the issue is as stated in the first paragraph of the argument in the brief of petitioner (p. 20), wherein the petitioner states:

> "A person can be properly indicted and convicted under Section 125 of the Criminal Code *only* if it is proved * * * (2) *that the proceeding* in which he took the oath was one *'in which a law of the United States authorizes an oath to be administered,'* " etc.

This is a correct statement of the rule. It is not a question of whether or not Senator Nye had the power or authority to administer the oath, but the question is whether it was a "proceeding" "in which a law of the

United States authorizes an oath to be administered." Petitioner is in error in saying that this issue was decided in favor of the Government by the Court below. It was briefed and argued, but is not referred to in the opinion of the Circuit Court of Appeals. Respondent on pages 22 and 23 of his brief, in opposition to petition for writ of certiorari, quotes from decisions of this Court which clearly establish the necessity that there be a proceeding or "case in which a law of the United States authorizes an oath to be administered." There is a vast difference between the authority to administer an oath and a proceeding or case under a law of the United States. The brief of petitioner does not answer this question in any respect.

III.

Materiality

Petitioner correctly states the issue as to materiality thus:

> "Thus the principal subjects of investigation were the 'campaign expenditures,' the campaign subscriptions, and 'all facts in relation thereto,' of *'the various candidates for the United States Senate.'*" (Op. Br. 30)

Respondent never was a candidate, and had no campaign. The inquiries, the answers to which are the basis of the indictment, pertained to non-existent things and were in every sense immaterial. This subject is presented on pages 20, 21 and 22 of the original brief of respondent. But petitioner states and cites authority for the rule, that "anyone is a candidate for whom a vote is asked." (Op. Br. 31) The evidence in this case indicates that no vote was ever asked or sought in any way of anyone for respondent for any office whatever. The

most that he did was to send in an application requesting that his name be placed upon the primary election ballot as a candidate for the Republican nomination for United States Senator, which application was received two days after the time limited for filing the same, and the request was therefore denied. The evidence is wholly devoid of any form of request of anyone to vote for him or support him in any way as a candidate for any office.

The record of the case fails to show a single incident or thing done that could in anywise be interpreted as any act in connection with a campaign.

Petitioner cites this Court's holding that the power to judge of elections "carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." But in the case at bar the election had not yet been held. There was no contest in existence, no issue anywhere to be determined. Can it be that a senate committee may wander throughout the nation calling whomsoever it will and take testimony pertaining to any and all subjects in anticipation that a contest may arise over the election of a United States Senator? If so, since we elect 32 senators every two years and since there are usually several candidates of each party in each state, such a roving senate committee would have the power to investigate matters pertaining to all candidates at primary elections of all parties and would thus have under their scrutiny the acts and doings of possibly two hundred men and their friends and supporters every two years, solely to gather evidence for a possible contest of an election, which most likely would never occur, and as did not occur in Nebraska in 1930.

Such possibilities and uncertainties are insufficient justification for a committee authorized by a senate resolution to travel the length and breadth of our land to take testimony in regard to no matter at issue.

IV.

The Whole of the Evidence of a Witness Is to Be Taken Together and if the Testimony Be Ultimately True, an Indictment Cannot Be Predicated Thereon

The petitioner incorrectly states the fourth question presented herein as being "Whether the respondent ceased to be a perjurer by retracting his false testimony the day after it had been given and he had left the stand." (Op. Br. 2)

The true question at issue is whether or not the whole of the evidence of a witness is to be taken together and if it be ultimately true, that the same does not constitute perjury. A thing is not judged by its individual parts but is judged by the whole. A corrected mis-statement forms no part of the evidence after the correction is made. It is no longer the assertion of a fact.

In respondent's original brief the rule and the authorities are set forth on pages 10 to 15. There are no contrary decisions and none have been cited by petitioner.

Petitioner is in error in its brief in stating that respondent concluded his testimony about 4:00 P. M. on September 22, 1930, that the committee "never expected or asked the respondent to return to the stand," and that respondent "of his own motion asked, and was granted, permission to return to the stand." The same error is

made in stating that respondent had completed his testimony on September 22. The record (p. 27) states "the defendant Norris was recalled to the witness stand the next day, September 23, 1930. * * * he was questioned by Senator Nye on this second day."

Since the proceeding was ex parte, being conducted solely by the Senate Committee, presided over by its chairman, Senator Nye, the Senate Committee must have been the one who recalled respondent to the witness stand for further testimony. At that time he was living in Oklahoma, from whence he was called to appear before this Senate Sub-Committee at Lincoln, Nebraska. Since he was recalled to the witness stand upon the second day, his continued attendance must have been at the behest of the Committee and all of his testimony so given would be taken and considered together.

Petitioner purports to state in its brief (p. 12) that the testimony of A. Paul Johnson in the instant case was substantially the same as the testimony which he gave before the Senate Sub-Committee on September 22, and 23, 1930. The record is entirely silent as to the testimony that A. Paul Johnson gave before the Senate Sub-Committee.

Petitioner asserts that seven witnesses testified between the time when respondent testified on the 22nd and 23rd days of September, 1930, but the record does not indicate the subjects concerning which any of them gave evidence other than A. Paul Johnson, who corrected his testimony immediately before respondent was recalled to the witness stand.

Petitioner states that respondent contends that he ceased to be a perjurer by retracting his testimony. This is not the position of respondent. His position is that

all of his testimony given upon this occasion upon September 22 and 23, 1930, must be taken together and no one part of his testimony may be separated and torn from the other so as to make the separate part constitute perjury. One oath only was administered to respondent and all of his testimony on both days was given under this one oath. Petitioner is not justified in saying that respondent had left the stand. It occurred in this case, as it often does with witnesses, that they are called to the stand and later recalled. It virtually was the giving of testimony upon one occasion only, though the hours of night intervened between the giving of his testimony on one day and before he gave further testimony again on the second day.

Petitioner attempts (Op. Br. p. 45) to distinguish the case of *Rex v. Carr*, 1 Siderfin 418, 82 Eng. Rep. 1191, from the one at bar and states that the original answer was ambiguous wherein it stated that the defendant, Dame Carr, had filed an answer setting forth that "she received no money." It is hard to figure how language could be more definite. The second answer states that "she received no money before such a day." It was in direct opposition to the first.

Cases Cited by Petitioner

There being no decided cases holding to the position for which petitioner contends, it has gone far afield in search of authorities and has presented in its brief various decisions in habeas corpus, contempt and larceny cases. Even many of these not only fail to support petitioner's contention but that of respondent.

One case only supporting the rule for which petitioner contends is cited and quoted thus:

> "'When false testimony concerning a material fact has been knowingly given, perjury has become and continues to be an accomplished and completed thing.' Seymour v. United States, 77 F. (2d.) 577, 582 (C. C. A. 8)" (Op. Br. 33-34)

But the Court that held this, less than two years later, with two of the same judges sitting (Sanborn and Faris), reversed this holding in deciding the present case below, and said that this statement was "obliter dictum merely" and "in fairly direct contradiction to what we deem the true rule of law." *Norris v. United States*, 86 F. (2d.) 379. (R. 57) In the same opinion the Court said:

> "As early at least, as 1669 (See, Roy v. Carr, 1 Siderfin's Rep. 418) it was held by the King's Bench in England, that a false answer in chancery is purged of perjury, if, in a subsequent answer filed in the cause, the false answer is corrected. From the above case seemingly, the well-settled modern rule had its origin. This rule is well stated in Bishop on Criminal Law (9th Ed.) Sec. 1044a, thus:
>
> "'The law encourages the correction of erroneous and even intentionally false statements on the part of a witness and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony. Says the New York Supreme Court "a judicial investigation, or trial has for its sole object the ascertainment of the truth, that justice may be done, it holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted of perjury."'
>
> "Ruled cases upon the point are few, but so far as we can find unanimous in upholding the view of the

law on the point taken in Mr. Bishop's excellent work, quoted above. (See, People v. Brill, 165 N. Y. S. 65; Henry v. Hamilton, 7 Blackf. (Ind.) 506; People v. Gillette, 111 N. Y. S. 133; Brannon v. State, 94 Fla. 656, 114 So. 429; Bijur v. Bendix, 285 F. 974. In fact no case, called to our attention by counsel, or which we have been able to find, contravenes the law upon the point as written by Mr. Bishop, Even two of the three cases cited herein by appellee affirm it as being the law." (R. 56)

Petitioner in its brief quoted from the observations of justices in the case of *Regina v. Holl*, 45 Law Times Reports 69 (Q. B. D. 1881) in part as follows:

> "COLERIDGE, C. J.—The argument on behalf of Mr. Edwards seems to me to be this. A witness may tell the Commisioners a deliberate tissue of falsehoods, trusting that the witnesses who could disprove them are being kept out of the way, but when finding that they are forthcoming, may come forward and say, 'All that I told you before was false; but now the truth is out I may as well acknowledge it,' and yet is entitled to his certificate. BOWEN, J.—I think there is just this amount of colour in the argument of the other side, *that an indictment for perjury could not be sustained on an answer afterwards corrected or explained.*" (Op. Br. 51)

The quotation should also have continued to include the next sentence, which reads:

> "Quite so, if corrected at the time; but, not, as in this case, after a long interval of time."

In a footnote of the brief of petitioner, page 59, referring to the case of *Brannan v. State*, 94 Fla. 656, 114 So. 429, involving the chastity of a woman concerning whom the defendant first testified that he had seen one

Thomas embrace her on Easter Sunday and later testified that he was not positive whether it was Easter Sunday, the Sunday before or the Sunday after, petitioner asserts in its brief (p. 60) that the defendant in that case had not been contradicted when he corrected his testimony. Such, however, is not the case for the opinion discloses that the defendant positively testified that he was "there this Easter Sunday a year ago * * * about 2 o'clock in the afternoon * * * sat there talking I guess 5 or 10 minutes, and happened to look toward the house, and I saw W——— P——— and somebody leave the front room and walk into the back room and he had his arms around her." After he had so testified "The state further introduced credible and unassailed evidence from which it could be lawfully found or inferred that the defendant could not have observed, on Easter Sunday, 1925, the events recounted by him in the foregoing testimony, because the young woman in question was away from her home on that day from about 9 o'clock a. m. until about 6 o'clock p. m., or later. The state thereupon rested."

After this testimony defendant returned to the stand and said he "was not positive that it was Easter Sunday, or the Sunday before or the Sunday after" and asked permission to return to the witness stand and correct that portion of his testimony. The Court permitted him to do so and he did correct his testimony. The Court held that having corrected his testimony, he was not guilty of perjury.

On page 61 of petitioner's brief, Judge Dietrich is quoted as saying in Ex Parte Keizo Shibata, with reference to the Gillette case, that it meant no more than that "where a witness who has given false testimony re-

tracts it before he leaves the witness stand, it cannot be made the basic of a perjury charge." That, however, was the situation in the case at bar. While the respondent was yet in attendance upon the Senate Committee, having been called from his home in Oklahoma to Lincoln, Nebraska, and before he was excused, he gave further testimony and corrected any errors that existed in his former evidence.

On page 60 of its brief, petitioner asserts:

> "Thus in bankruptcy cases both District Judge Holt and District Judge Chatfield have indicated that a bankrupt who first denies that he has any assets and then admits the contrary should be prosecuted for perjury. In re Gordon, 167 Fed. 239, 240 (S. D. N. Y.); in re Wiesebrock, 188 F. 757, 758 (E. D. N. Y.)"

But *In re Gordon, supra,* Judge Holt in deciding the case, said:

> "But there is another ground upon which I prefer to put my decision in this case, and that is the importance of not discouraging bankrupts who have given false testimony from afterwards admitting the truth. Almost every bankrupt who has intentionally concealed his property before bankruptcy concocts a false explanation, and, when he is examined, at first gives false testimony in support of such a fabricated explanation. It frequently happens that a bankrupt, after cross-examination has exposed the improbability of absurdity of the evidence given, would be willing to confess the truth, if he were not afraid of the consequences of the false evidence that he has given. In such cases he must take the chances of a prosecution for perjury; but, so far as the charge of contempt is concerned, I think that he should be regarded as having purged his contempt if he has, at any time in the course of his examination, given such full and

truthful information concerning his estate as the creditors have a right to require. I think, therefore, as a general rule, that, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt."

And in the Wiesebrock case the bankrupt testified falsely in an attempt to conceal assets, but later much of the false testimony was admitted or corrected by the bankrupt, and Judge Chatfield said in the opinion:

> "But even then the bankrupt would have been allowed to purge himself of contempt, in so far as he could by giving correct testimony or information as to the property."

There is no statement in either of these cases that such a one "should be prosecuted for perjury." In fact, in the latter case the opinion states "that the matter was referred to the district attorney" and he "informed the Court that no action was deemed advisable."

Also the quotation in petitioner's brief (Op. Br. 61) from the decision of Judge Hand in *Loubriel v. United States,* 9 F. (2d) 807, reading "Perhaps all a man's testimony upon a continued inquiry must be taken together, and no prosecution will lie *if he recants before he is through,*" sustains the position of respondent.

In the case of *Rex v. Coote,* 10 British Columbia Reports 285, 290, also is cited by petitioner (Op. Br. 47), the first two paragraphs of the opinion read:

> "MARTIN, J.: As to the first question reserved for the consideration of this Court, it should, in my opinion, be answered in the affirmative, because it

is clearly established by the authorities I referred to during the argument that on such a charge the accused is entitled to have laid before the jury at least any portion of his evidence at the former trial out of which the accusation arose which would explain or qualify the statement alleged to be a perjury; Rex v. Carr (1669), 1 Siderfin 418-9; Rex v. Jones (1791), Peake 51; Rex v. Dowlin (1792), ib. 227; Reg. v. Britton (1893), 17 Cox C. C. 627; 1 Russell on Crimes (1896), 378-9; Roscoe's Criminal Evidence (1898), 727; Archbold's Criminal Pleading (1900), 1,008-9.

"Here there was evidence of that nature which may well have had weight with the jury, and the failure to lay it before them is a 'substantial wrong' within the meaning of section 746 of the Criminal Code; Reg. v. Hamilton (1898), 2 C. C. C. 390."

In the case of *People v. Freeman*, 256 Ill. App. 233, cited by petitioner (Op. Br. 53), it was held that the witness was guilty of contempt of Court though he had testified falsely and the witness admitted that 'he had lied, and that his answers to the questions on his direct examination were false."

But Mr. Presiding Justice Wilson, in the opinion, said:

"It is not necessary in our opinion that such testimony, however, should be of the same kind and character as would be necessary to support a charge of perjury."

Neither does the case of *Rex v. Simmons*, 8 Car. & P. 50 (Op. Br. 43) mention the subject of retraction, as indicated by the petitioner in its brief. (Op. Br. 43)

By letter, counsel for petitioner has advised respondent that in addition to the material appearing in the

printed brief, petitioner will refer to the case of *Masaichi Ono v. Carr,* 56 F. (2d) 772 (C. C. A. 9), which was a habeas corpus proceeding against a district director of the United States Immigration Service. The petitioner in that case and his wife had applied to immigration authorities for admission to the United States and had testified falsely on November 12, 1930, that he had paid $30,000 for an interest in a co-partnership. He again testified on November 18 and November 19, and the opinion states "it was not until the fourth appearance before the immigration authorities, on November 21, 1930, that the applicant admitted that his testimony was false."

The opinion states that petitioner filed two applications to enter the United States and recites other facts showing a planned effort, by hook or crook to enter the United States. The opinion reads in part:

> "It is argued that in view of the fact that the applicant changed his testimony before his original application was finally passed upon, he was not guilty of perjury although he concedes that he did swear fasely upon his application. Assuming without deciding that such is the rule where a retraction is seasonably and voluntarily made, it was *too late* to come under the rule. Ex parte Keizo Shibata (C. C. A.) 35 F. (2d) 636; Johnson v. U. S. (C. C. A.) 41 F. (2d) 44."

In the same letter counsel state they will refer also to the case of *Ex parte Chin Chan On,* 32 F. (2d) 828, also a habeas corpus case of a Chinaman who sought admission to the United States and first testified on January 23, 1929, again on February 20, and lastly on March 11 of the same year. On this latter date he admitted that he had practiced polygamy in China.

In this letter, counsel refer to the case of *Johnsen v. U. S.* (C. C. A. 9), 41 F. (2d) 44, but here the Court said, referring to the case of Keizo Shibata, 35 F. (2d) 636:

> "Considering the reasons there suggested, *it may be that a retraction seasonably and voluntarily made should be encouraged by relieving the party of the consequences of perjury;* but, in the absence of a ruling by the trial court upon a record made up carefully and fully to present the circumstances surrounding the alleged retraction, we do not feel warranted in deciding a question of such importance."

Respondent therefore submits that the decision of the Circuit Court should not be reversed upon this issue, that it should be affirmed for the other reasons set forth herein, and that this action should be dismissed.

Respectfully submitted,

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